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9 Attorneys for Defendant
10 THOMAS J. TOMANEK

11 IN THE UNITED STATES DISTRICT COURT
12
13 NORTHERN DISTRICT OF CALIFORNIA
14

15 EDITH MACIAS, individually and on behalf
16 of similarly situated individuals; HOTON
17 DURAN; TIFFANY HUYNH; AURA
18 MENDIETA; WILLIAM LABOY; MIGUEL
19 ACOSTA; CRUZ ACOSTA; CUAUHEMOC
20 TORAL; and TERESA VILLEGAS,

21 Plaintiffs,

22 vs.

23 THOMAS J. TOMANEK; and MARK
24 GARIBALDI, individually and doing business
25 as THE GARIBALDI COMPANY,

Defendants.

Case No.: C07 3437 JSW

**REPLY TO PLAINTIFFS'
OPPOSITION TO DEFENDANT
THOMAS J. TOMANEK'S MOTION TO
DISMISS FOR LACK OF SUBJECT
MATTER JURISDICTION**

DATE: January 11, 2008
TIME: 9:00 a.m.
COURTROOM: 2, 17th Floor
JUDGE: Hon. Jeffrey S. White

1 Plaintiffs acknowledge in their opposition to the within motion that they do not allege
 2 any federal claims against defendant TOMANEK and that diversity between the parties is
 3 lacking. They further acknowledge that, if this Court dismisses plaintiffs' RICO claim, then it
 4 would be appropriate to dismiss plaintiffs' claims against TOMANEK. (Doc # 28 at page 2)

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 6 This is a case in which plaintiffs base their RICO claim on the post-lease termination
 7 mailing of written advice about the disposition of the tenants' security deposits, a mailing
 8 unnecessary to the alleged "scheme." *Schmuck v. United States*, 489 U.S. 705, 712 (1989)
 9 [mailing must be "incident to an essential part of the scheme."] Plaintiffs thus fail to state a
 10 RICO claim.

11 In *Mendoza v. Zirkle Fruit Co.* 301 F.3d 1163, 1174-1175 (9th Cir. 2002), cited by
 12 plaintiffs as authority for pendent party jurisdiction on a RICO claim (Doc # 28 at page 2), the
 13 Ninth Circuit held only that the decision to decline to exercise supplemental jurisdiction is
 14 discretionary. The Court remanded the case to the district court to determine the propriety of
 15 supplemental jurisdiction in the context of that litigation. Pursuant to 28 USC § 1367 (c) (3), it
 16 is clearly appropriate for the court to exercise its discretion here to dismiss all plaintiffs' state
 17 claims if the court dismisses the RICO claim—the only claim for which it would have original
 18 jurisdiction.
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20 For these reasons, and those set forth more specifically in the moving and reply papers
 21 of GARIBALDI, incorporated by reference herein as if fully set forth, the motion to dismiss
 22 plaintiffs' first amended complaint for lack of subject matter jurisdiction should be granted.
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1 Respectfully submitted,

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3 Dated: November 26, 2007

Allman & Nielsen, P.C.

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5 _____
6 /s/

7 Sara B. Allman
8 Attorneys for Defendant
9 THOMAS J. TOMANEK
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PROOF OF SERVICE

I am a citizen of the United States and employed in Marin County, California. I am over the age of eighteen years and not a party to the within action. My business address is 100 Larkspur Landing Circle, Suite 212, Larkspur, California 94939-1743.

On this date I served the foregoing documents described as:

**REPLY TO PLAINTIFFS' OPPOSITION TO DEFENDANT THOMAS J. TOMANEK'S
MOTION TO DISMISS FOR LACK OF SUBJECT MATTER JURISDICTION**

on the interested parties in the action by placing ☐ the original ☒ a true copy thereof, enclosed in a sealed envelope addressed as follows:

Christopher Brancart
Elizabeth Brancart
BRANCART & BRANCART
PO Box 686
Pescadero, CA 94060

Attorney for Plaintiffs EDITH MACIAS,
individually and on behalf of similarly
situated individuals; HOTON DURAN;
TIFFANY HUYNH; AURA MENDIETA;
WILLIAM LABOY; MIGUEL ACOSTA;
CRUZ ACOSTA; CUAUHTEMOC TORAL;
and TERESA VILLEGAS

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Attorneys for Defendant
MARK GARIBALDI, individually and
doing business as THE GARIBALDI
COMPANY

☒ BY MAIL: I deposited such envelope with postage thereon fully prepaid in the United States Postal Service mailbox at Larkspur, California.

☐ BY PERSONAL SERVICE: I delivered such envelope by hand to the addressee.

☐ BY FACSIMILE: I sent such document via facsimile to the facsimile machine of the addressee.

☐ BY EXPRESS MAIL: I deposited such envelope in a mailbox regularly maintained by the United States Postal Service for receipt of Express Mail postage paid to be delivered by Express Mail for overnight courier service to the addressee.

☐ BY OVERNIGHT DELIVERY: I deposited the envelope, in an envelope designated by the express service carrier, with delivery fees provided for, in a box regularly maintained by the express service carrier for overnight delivery.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct to the best of my knowledge.

1 Executed on November 26, 2007, at Larkspur, California.

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